In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1353

THE ELMO COMPANY, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a–6a) is reported at 389 F. 2d 550. The order and opinion of the Federal Trade Commission (Pet. App. 10a, 11a–14a) have not been officially reported.

JURISDICTION

The final decree of the court of appeals (Pet. App. 1a) was entered on January 23, 1968. The petition for a writ of certiorari was filed on April 22, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

307-268—68

QUESTION PRESENTED

Whether a greater showing of public interest is required to support a Federal Trade Commission order reopening a cease-and-desist order than is required to support the issuance of an initial complaint.

STATUTE INVOLVED

Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)) provides in pertinent part:

> * * * After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

STATEMENT

Petitioner ("Elmo") sells a combination of drugs and devices, under the name of the Elmo Palliative Home Treatment, for the treatment of ailments in the nose and ear passages. In February 1952 the Federal Trade Commission issued a complaint charging Elmo with false and deceptive practices in violation

of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a). Elmo did not answer the charges, but instead consented to a cease-and-desist order which prohibited it from making certain claims in its advertising but did not prevent it from claiming that the Elmo Treatment would have some beneficial effect in the treatment of deafness, impaired hearing, or head or ear noises (48 F.T.C. 1379). The decree also provided "that this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in paragraph (f) of Rule V of the Commission's Rules of Practice" (48 F.T.C. at 1387). Former Rule V provided that the Commission may, after opportunity for hearing, set aside the consent settlement if the public interest so requires.[1]

In 1964 the Commission issued a second complaint charging that Elmo's claims of beneficial effects on deafness constituted false advertising. *The Drive-X Co.*, [1963–1965 Transfer Binder] Trade Reg. Rep. ¶ 16,783 at 21,732. Elmo filed suit in the district court to enjoin the Commission from proceeding against it in this manner on the ground that the consent settlement required the Commission to reopen the prior proceeding pursuant to Rule V(f). The court of appeals reversed the district court's dismissal of the suit, holding that Elmo had a right to require the Commission to conform to the reopening procedure set forth in Rule V(f). *The Elmo Division of Drive-X*

[1] Paragraph (f) of Rule V is set out at Pet. 4–5. The current rule governing reopening and modification of Commission orders (16 C.F.R. § 3.72(b) (1968)) is not in issue here.

Co., Inc. v. *Dixon*, 348 F. 2d 342 (C.A.D.C.) (Pet. App. 36a).

The Commission then ordered the original proceeding reopened and referred the matter to a hearing examiner "for the purpose of receiving evidence to determine whether a change of law or fact, or the public interest, requires that the consent settlement be set aside in whole or in part" (J.A. 1–5).[2] A full evidentiary hearing was held pursuant to the Commission's order. Complaint counsel introduced testimony of three doctors (J.A. 43–80) that the ingredients comprising the Elmo Treatment would not have any beneficial effect on hearing loss or head or ear noises (J.A. 44–47, 70–72, 75–78) and in certain cases might be harmful (J.A. 46, 64–65, 72). Elmo introduced contradictory testimony by three other doctors (J.A. 116–120), and also relied upon its cross-examination of the Commission's three experts (J.A. 108–111), extracts from medical texts, and testimonials from lay users.[3]

Upon consideration of all the evidence, the examiner concluded, on the basis of the Commission's expert testimony that the Elmo Treatment would have no beneficial effects in the treatment of hearing loss or head or ear noises and the fact that petitioner's ad-

[2] "J.A." refers to the joint appendix filed in the court of appeals.

[3] The evidence was introduced, by stipulation of counsel, in the form of extracts from the record made in the proceedings initiated pursuant to the second complaint, which had been vacated after the decision of the court of appeals.

vertising claimed such beneficial effects,[4] that the public interest required that the consent settlement be set aside in part.

The Commission agreed with the examiner's findings and conclusions, but set aside the 1952 consent order in its entirety (Pet. App. 10a, 13a).[5] In its opinion (Pet. App. 11a–14a), the Commission stated (Pet. App. 13a):

> 1. The order issued in 1952 and now in effect permits respondent to represent that the use of its preparation and device will have some benecial effect in the treatment of deafness, impaired hearing, or head or ear noises.
>
> 2. The medical testimony in the record, summarized in Finding 10 at pages 9–17 [Pet. App. 23a–30a], supports the conclusion that the preparations and devices comprising the Elmo Palliative Home Treatment have no beneficial effect whatsoever in the treatment of poor hearing, deafness, and head or ear noises.
>
> 3. Respondent's current advertising represents that its products will relieve poor hearing and head or ear noises.

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[4] Elmo's promotional material claimed at least that the Elmo Treatment would have some beneficial effect on hearing loss or head or ear noises, and it could be read as claiming even greater benefits from the treatment (J.A. 23–24, 81–107).

[5] The Commission noted that its opinion did not intimate any view as to the terms or scope of a superseding cease-and-desist order to be determined in subsequent proceedings (Pet. App. 12a–13a). In order to avoid any hiatus during which Elmo would be entirely free of any order, the Commission stayed its ruling until a superseding order shall become final (Pet. App. 13a–14a).

4. On the basis of the foregoing, we conclude that the 1952 order fails adequately to protect the public interest.

In the court of appeals, the parties stipulated that the Commission's findings 1–3, *supra*, were correct, thus raising "as the sole issue before this Court the legal adequacy of the conclusion set forth in paragraph 4 * * *" (Pet. App. 7a).[*] The court of appeals affirmed the Commission's order, holding that (Pet. App. 6a) "the Commission makes a sufficient showing to re-open a prior order if it shows reasonable grounds to believe that the public interest at the present time would be served by the re-opening. Such a showing has been made here."

ARGUMENT

The decision below is correct, and the case involves procedures which have been superseded by the Commission's current rules of practice. There is no occasion for further review.

Petitioner, who had a full adversary hearing under former Rule V, stipulated in the court below that for purposes of judicial review it would accept the Commission's findings that the medical testimony supports the conclusion that the Elmo Treatment has no beneficial effects whatever on hearing difficulties, and that Elmo claims such benefits in its advertising (Pet. App. 7a). Thus the only question here is whether the Commission's uncontested findings were sufficient to

[*] Although petitioner stipulated that Commission finding number 2, in its precise terms, was correct, petitioner apparently does not concede that the Elmo Treatment has no beneficial effect in the treatment of hearing disorders.

permit it to set aside the consent order and reopen the proceedings. This is a matter which Congress plainly has committed to the agency's discretion. Cf. *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428. Congress expressly authorized the Commission to "reopen and alter, modify, or set aside" a prior order "whenever * * * the public interest shall so require" (15 U.S.C. 45(b))—thus indicating that cease-and-desist orders are to be continuing vehicles for the protection of the public, subject to modification whenever necessary. The uncontested findings here fully support the Commission's determination that the public interest required that the consent order be set aside.

Petitioner complains that the standard applied by the Commission and affirmed by the court below is essentially the same standard the Commission would apply in issuing a new complaint. So it should be. When the Commission has reasonable grounds to believe that the public is being defrauded by a firm's misleading advertising, it has a duty to begin a formal inquiry into the matter whether or not an order was previously entered against that firm. If the Elmo Treatment has no beneficial effects whatever on hearing difficulties, thousands of trusting buyers may be defrauded or possibly injured by reliance on Elmo's promotional representations. Elmo has no vested right in an inadequate order, and there is no reason why such an order should operate as a limitation on the Commission's power to reach and remedy an abuse which its uncontested findings indicate. See *Mohr* v. *Federal*

Trade Commission, 272 F. 2d 401, 406 (C.A. 9), certiorari denied, 362 U.S. 920. Cf. *P. Lorillard Co.* v. *Federal Trade Commission*, 186 F. 2d 52, 55 (C.A. 4). And in subsequent proceedings to determine the terms of a superseding order, Elmo will not occupy a different position than a firm against which a prior order had not been entered because it will be entitled to a full hearing on the merits in which complaint counsel has the burden of proof.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

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